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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1292

BUILDING AND CONSTRUCTION TRADES COUNCIL OF NEW ORLEANS, AFL-CIO, *Petitioner*,

v.

NATIONAL LABOR RELATIONS BOARD, *et al.*, *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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STATUTES:

National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. § 151, et seq.):

Section 8(b)(4) 1

MISCELLANEOUS:

Lesnick, "The Gravamen of the Secondary Boycott," 62 Colum. L.Rev. 1363 4

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Introduction

In Petitioner's view, several factors make it appropriate to file a reply to the briefs in opposition filed on behalf of the Board and District 50, United Mine Workers, *amicus curiae*. First, the Board's brief has raised the irrelevant issue of the possible effect of various legislative efforts to amend Section 8(b)(4) of the Act on the certworthiness of the issues raised by the Petition. Second, the briefs in opposition have misstated the nature of Petitioner's position concerning this Court's decisions in the *Denver*[1] and

[1] *NLRB* v. *Denver Building and Construction Trades Council*, 341 U.S. 675.

General Electric[2] cases. In so doing, the briefs gloss over the sharp division both in the Court below and in the Board concerning the substance of the issues as actually presented by Petitioner.[3] Finally, it is worth noting that even the Board's brief does not deny the importance of the federal question presented by the Petition or the drastic effects of the decisions below on the basic rights of organized labor in the construction industry.

I

The Board's brief in opposition alleges that the Petition herein is an attempt to obtain judicially the overruling of *Denver* which the Building and Construction Trades Department has been unable to obtain from Congress. In the Court below, one-fifth of the Board's Brief was devoted to a prejudicial narrative of efforts made in Congress during the past 13 years to overturn this Court's decision in *Denver*. No legal authorities were cited by the Board, and none is cited here, to indicate why Congressional inaction[4] in this area is entitled to any judicial significance.

The answer to the Board's contention is that, for the reasons set forth in the Petition and hereinafter, *Denver* is distinguishable from the instant case. Accordingly, efforts to overturn that decision in Congress are irrelevant to the instant case, which does not present the same issue. Furthermore, the legal interpretation of a statute is properly based upon its provisions and judicial decisions thereunder rather than legislative history of efforts to amend the law. As this Court stated in *Commissioner of Internal Revenue* v. *Church*, 335 U.S. 632, 650, n. 11, quoting from

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[2] *Local 761, Electrical Workers* v. *NLRB (General Electric)*, 366 U.S. 667.

[3] The Court's attention in this regard is respectively directed to the discussion of the decisions below at pp. 6-10 of the Petition.

[4] It is to be noted that Congress has never registered a negative vote on the proposition of overturning the *Denver* case.

Helvering v. *Hallock*, 309 U.S. 106:

> ". . . we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."

A similar attitude was expressed in *Interstate Commerce Commission* v. *Railway Labor Executives Association*, 315 U.S. 373. There the Court reached a result which had been the subject of a prior unsuccessful request for Congressional corrective action. The Court held it "cannot impute to Congress' failure to amend the [ICC Act] the significance which the petitioners contend it should have," because such a conclusion "is at best the product of a set of inferences, none of which is free from doubt."

It is also pertinent to observe that, notwithstanding the emphasis placed upon this argument by the Board below, not one of the three judges saw fit to place any reliance on it.

II

The briefs in opposition of the Board and the *amicus curiae* attribute to Petitioner a position with respect to the *Denver Building Trades* case which has not been advanced by Petitioner. Specifically, both the Board and the *amicus curiae* state that Petitioner seeks, via the Petition, to reverse this Court's decision in *Denver*, and that Petitioner contends that the *General Electric* decision overruled *Denver*. Thus, the brief of the *amicus curiae* refers to the "Trades Council's argument that *General Electric sub silentio* overruled *Denver Building Trades*." (Brief, p. 5.) Similarly, the Board's brief states that ". . . petitioner seeks to obtain judicially the overruling of *Denver* . . ." (Brief, p. 11; see also Board's brief at page 8.)

We assume that this Court will look to Petitioner's own statement of its position, rather than to the assertion of

other parties with respect thereto. To this end, Petitioner respectfully refers the Court to page 20 of the Petition. There, Petitioner's view of the relationship of this case to *Denver* is stated as follows:

> "It is respectfully submitted that a reversal of the Board's decision and order in this case *would not involve a reversal of the decision in Denver.*
>
> "The issues in the *Denver* case are different from the issues in the instant case...." (Emphasis supplied.)

As set forth more fully in the petition, the basic difference between *Denver* and the instant case is that in the former this Court found that the only way in which the Denver Council could accomplish its objective was to force the neutral general contractor to cease doing business with the electrical subcontractor with whom the Council had its dispute. In marked contrast, the New Orleans Council's objective here could have been satisfied if Markwell & Hartz, the general contractor, had raised the wages of its own employees. Thus, the dispute with Markwell & Hartz was strictly primary in nature.[5]

The essence of Petitioner's position concerning the effect of *General Electric* and *Carrier*[6] is that, under those decisions, the *Moore Dry Dock* rules are to be applied only when the work of the employers present at a common situs is unrelated, and that this Court did not intend in *General*

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[5] The Board's citation, at page 10 of its brief in opposition, of footnote 292 of Professor Lesnick's article, "The Gravamen of the Secondary Boycott," 62 Colum. L. Rev. 1363, 1425, is clearly not pertinent, since that note refers solely to the relationship of two subcontractors working side by side. Actually, Judge Wisdom, in his dissenting opinion below, interpreted Lesnick's rationale as requiring a holding that the picketing in the instant case was lawful and *Denver* distinguishable. (Footnote 13 of dissenting opinion; Pet. App. 16a.)

[6] *United Steelworkers v. NLRB (Carrier Corp.)*, 376 U.S. 492.

Electric[7] and *Carrier* to establish one set of rules to govern common situs picketing at a manufacturing plant and another in the construction industry (Petition, pp. 12-13, 17-19).

The only statement offered by the Board in its brief to justify its unequal application of law is contained at page 10 thereof:

> "It is our view that the 'related work' concept enunciated in *General Electric* was designed to meet the *special problem* presented where some of the independent contractors at work on *the primary employer's premises* are performing work directly connected with his day-to-day operations (e.g., routine maintenance), while others are performing work of a more long-range nature (e.g., capital improvements). . . .
>
> "However, in the typical construction project situation there is no need to inquire whether the other contractors are performing work related to the normal operations of the contractor with whom the union has its primary dispute. While the tasks performed by the various crafts on a construction project are related in the sense that they all enter into the construction of the same facility and one often depends upon the completion of the other, under *Denver* the relation is not, as a matter of law, the equivalent of furnishing materials and services needed for the day-to-day operations of a struck plant." (Emphasis supplied.)

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[7] The Board's statement of the situation in *General Electric* is imprecise. The Board states, at page 9 of its brief, that, "The company, in an effort to minimize the impact of the picketing on *these* independent contractors, set aside a separate gate exclusively for their use." (Emphasis supplied.) This leaves one with the impression that the gates there were established after the commencement of the picketing which gave rise to the *General Electric* case itself. In point of fact, the gates had been established some four years prior to the specific dispute before the Court in that case. Thus, unlike the instant case, there was no attempt to use the separate gates as a device to convert lawful picketing into unlawful picketing. See further in this regard footnote 9 of the Petition herein, at page 18.

The position just expressed is radically different from that stated to this Court by the Board in its brief in the *General Electric* case:

> "The situation here [GE] is substantially similar to that in *Denver* and *Electrical Workers,* pp. 17-18 supra. There, as here, the premises were the regular work site for a number of different employers and their employees. . . .
>
> "*Denver* and *Electrical Workers* cannot be distinguished on the ground that the relationship between contractors on a building and construction project is materially different from that between General Electric and its contractors at Appliance Park." (Board Brief, at page 34.)

The transformation of the Board's view of the manufacturing and construction contexts from indistinguishable to totally disparate is certainly not required by this Court's decisions in *General Electric* or *Carrier.* Moreover, even though the contradiction between the Board's positions before this Court in *General Electric* and in the instant case was clearly stated in the Petition (at pages 13-20), the Board's brief is silent; no explanation or rationalization is offered for this self-contradiction.

III

At pages 24-26 of the petition, the significance of the question presented by the Petition, both in terms of the administration of the National Labor Relations Act and the strangulating effect of the decisions below on the rights of labor organizations in the construction industry, was demonstrated. Included were references to several law review notes, commenting adversely on the harsh and discriminatory effects of the *Markwell & Hartz* doctrine on unions in that industry. It is, therefore, significant that nowhere in the Board's brief in opposition is there a denial of the importance of the question presented by the Petition.

Conclusion

For the foregoing reasons, and those set forth in the Petition for the writ, the Petition should be granted.

Respectfully submitted,

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